IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

1. **WRIT PETITION NO.1167 of 2006**

Dilip S. Dahanukar, aged 40 yrs
residing at Flat No.1
Khusma Apartment,
M.L.Dahanukar Marg,
Mumbai-400026 .. Petitioner.

Vs
1.Kotak Mahindra Co.Ltd,
a compnay ... having its office
at 36-38A, Nariman Bhavan,
227, Nariman Point,
Mumbai-400 021.

2. State of Maharashtra, Respondents

WITH

2. **WRIT PETITION NO.1168 of 2006**

Dilip S.Dahanukar, .. Petitioner

Vs

1.Kotak Mahindra Co.Ltd

2.State of Maharashtra. Respondents

Mr Subhash Jha with G.D.Upadhyay Laxmi Menon with Jimesh Shah and Gaurav Agarwal i/b i/w Law Global, for the petitioner.
Mrs Revati Mohite-Dere, for respondent no.1.
Mr A.S.Shitole, APP, for the respondent-State.

WITH

3. **REVISION APPLICATION NO.237 of 2006**

1.G.T.B.Road Lines,
Boss Bhima Complex,
Steel Yard, Kalamboli,
New Mumbai,

2.Satnam Singh,
Pro.G.T.B.Road Lines .. .. Petitioners.

Vs

1.State of Maharashtra,

2. Shri Harbans Singh s/o Chatter
Singh, r/o Vaikunth Banglow,
8th road Sindhi Society,
Chembur,
Mumbai-71, through his
CA Amar Singh Kajarai, .. Respondents.

Mr J.S.Padam, for the petitioners.
Mr A.S.Shitole, APP, for the respondents.

CORAM : D.B.BHOSALE, J.

DATED : 6th JUNE, 2006

ORAL JUDGMENT:

1. Rule. Returnable forthwith. The respondents waive service. By consent, rule is heard forthwith.

2. These three petitions have given rise to a short yet important question that whether the appeal court on presentation of an appeal against the order of conviction under section 138 of the Negotiable Instruments Act (for short, "the Act") has power to direct payment of compensation, awarded by the learned Magistrate, in whole or any part thereof, as a condition for suspending substantive sentence.

3. In all the three petitions, the orders impugned are similar. In the first two writ petitions, the learned Addl.Sessions Judge has directed the petitioner-accused to pay five lacs rupees within four weeks as a condition precedent for

suspending the substantive sentence of SI for one month and compensation quantified as Rs.fifteen lacs

under section 357(3) of the Criminal procedure Code (for short, "the Code"). In the third petition an amount of Rs.three lacs has been directed to be paid for suspending the sentence of imprisonment and payment of compensation awarded by the learned Magistrate. In the appeals filed by the petitioner in the first two writ petitions, besides the other prayers, he had prayed for modification of the order of deposit of the compensation imposed by the trial Court to enable the petitioner to pay the said amount and for reduction of the amount of compensation. In the third petition since only the impugned order dated 18.4.2006 is annexed, it is not clear as to what was the prayer in the memo of appeal insofar as the amount of compensation is concerned.

4. By the orders dated 23.2.2006, impugned in the appeal before the Sessions Court, in the first two petitions the learned Magistrate held that the accused no.1-M/s Goodvalue Marketing Co.Ltd and accused no.2-Dilip S Dahanukar, Chairman of accused no.1, were guilty of the offence punishable under section 138 read with 141 of the Act. Accused no.1 has been sentenced to pay a fine, in default of payment of

fine, accused no.2 Dilip Dahanukar, being the Chairman of the company and its representative at the trial, is to suffer simple imprisonment for one month. Accused no.2 Dilip Dahanukar is also independently sentenced to suffer S.I for one month and to pay compensation under section 357(3) of the Code. Insofar as 3rd petition is concerned, the substantive sentence of imprisonment and compensation has been suspended on payment of Rs.three lacs within six weeks from the date of the order. In the first two writ petitions, when they came up for admission before the learned Vacation Judge on 24.5.2006, the following order was passed :-

> "1. The trial Court awarded compensation of Rs.15 lacs along with other sentences. The appeal came to be preferred by the present applicant before the learned Sessions Judge. The learned Sessions Judge admitted the appeal on condition that the applicant deposited the sum of Rs.five lacs within a period of four weeks. The present application has been filed by the applicant for relaxation of the condition of deposit of Rs.five lacs. This court is not inclined to interfere in this regard. However, the applicant is at liberty to move the same Court for time.
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> 2. The applicant is at liberty to move the Court to press for orders after re-opening of Courts after summer vacation."

It is against this backdrop, I heard the petitions, by consent, for final disposal at the stage of admission.

5. Mr.Jha, learned counsel for the petitioner in the first two writ petitions, submitted that the learned Addl.Sessions Judge ought to have appreciated the scope, ambit and purport of the provisions contained under section 357 of the Code inasmuch as if the fine is imposed then the compensation has to come out of the fine amount itself and there cannot be a separate order for payment of compensation. He further submitted that section 357(1) and (3) has to be read in conjunction and not in isolation. Harmonious construction of sub-section (1) and (3) of section 357, according to Mr Jha, would mean that filing of the appeal and its admission, operates as stay to the order of compensation as contemplated under sub-section (2) of section 357. In other words, the object of granting compensation is one and the same under these provisions. When the order of compensation granted under sub-section (1) gets automatically stayed in the event of filing of an appeal there is no reason as to why the stay shall not operate in respect of the compensation granted under sub-section (3) of section 357 of the Code. In other words, he submitted that merely because sub-section (2) is coming under sub-section (1) and speaks of fine imposed by the court in an appeal, benefit of the stay engrafted under the section cannot be restricted to sub-section (1) alone and the benefit should be given

even in case of compensation directed to be paid under sub-section (3). He placed heavy reliance upon the judgment of the High Court of A.P. in **V.Prasad Rao Vs. State of AP, 2002 Cr.L.J.395.**

. Mr.Padam, learned counsel for the petitioners in the third petition, in addition to the submissions made by Mr Jha, submitted that the provisions contained under section 374 or 389 do not provide for imposing any such condition while admitting the appeal. Right of appeal is a statutory right and, therefore, such right cannot be curtailed by imposing a condition without taking into consideration the capacity of an accused as to whether he can fulfil such condition.

. On the other hand, Ms Mohite-Dere, learned counsel for the contesting respondents drew my attention to the judgments of the Supreme Court in **Stanny Felix Pinto Vs. Jangid Builders Pvt Ltd and Anr (2001) 2 Supreme Court Cases 416** and in **Hari Singh Vs Sukhbir Singh and others, 1988 SCC (Cri) 984** and submitted that the Court has sufficient power to impose such condition while admitting the appeal under section 357(3) of the Code. She further submitted that in view of the settled position in law the order of the learned Adds.Sessions Judge cannot be faulted.

My attention was also drawn to the prayer clause (d) in the appeal memo submitting that the petitioner had only prayed for modification of the order insofar as the compensation was concerned and what was further prayed was only reduction of the amount of compensation to enable the petitioner to comply with the same and, therefore, the petitioner cannot turn around and challenge the order of payment as condition for suspending the sentence.

6. Section 357 of the Code deals with order to pay compensation. Sub-section (1) thereof states that when the Court imposes a sentence of fine or a sentence, including a sentence of death, of which fine forms a part, the Court may direct that the whole or any part of the fine recovered to be applied, firstly, when defraying the expenses incurred in the prosecution and, secondly, for payment of compensation for any loss or injury sustained by the injured victim. It would be advantageous to reproduce the relevant provisions contained in Section 357 to address the question that falls for my consideration.

> "357. Order to pay compensation - (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied -

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bonafide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) when a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) x x x x

(5) x x x x

7. A bare perusal of the aforesaid provisions

would show under sub-section (2) if the fine is imposed as provided for in sub-section (1) "such payment" shall not be made before the period allowed under law for preferring the appeal has elapsed, or, if an appeal is presented before the judgment in the appeal is pronounced. Undoubtedly, sub-section (2) operates as automatic stay "for payment" of compensation out of the amount of fine imposed by the trial Court. In other words, order of payment of compensation contemplated under sub-section (1) would remain stayed pending hearing of the appeal. Sub-section (2) does not state that the payment of fine itself would remain stayed. In my opinion, even if the appeal is presented within time, as stated in sub-section (2) still the Court can direct and should direct that the fine part be remitted within certain period. The expression "no such payment shall be made" in sub-section (2) will have to be read in conjunction with the expression "in the payment to any person" in clause (b) and "in paying the compensation to the person" in clause (c) of sub-section (1). That would clearly show that what automatically gets stayed is the payment of compensation to be made out of the sentence of fine amount paid and not the payment of fine. In other words under sub-section (2) what remains stayed is only payment of compensation out of the fine paid and not the compensation under

subsection (3) of section 357 of the Code.

8. It may also be noted at this stage that the "fine" directed to be paid in the proceedings under section 138 of the Act and the "fine" under section 357(1) have different complexion. Under section 138 the "fine" amount may extend to twice the amount of the cheque. Whereas the "fine" under subsection (1) of Section 357 cannot exceed five thousand rupees as provided under section 29 of the Code. The automatic stay under subsection (2) of Section 357 on "payment of compensation" out of the sentence of fine imposed on accused under sub-section (1) in the event of presentation of appeal would, therefore, not operate insofar as the amount of compensation awarded under sub-section (3) of Section 357 of the Code. In other words, in the proceedings under section 138 of the Act, the appeal Court will have power to direct payment of compensation, in whole or any part thereof, as a condition for suspending the substantive sentence of S.I. and compensation. While so directing, the Court will have to bear in mind that the amount of compensation directed to be paid pending appeal is reasonable and ability of the accused to pay. The proposition of law laid down in the judgment of the A.P.High Court in **V.Prasad Rao case (supra)** would not apply to the facts of the present case. The facts of

that case are not clear. Even the offence is not clear for which the accused was convicted and sentenced to pay compensation.

9. Insofar as sub-section (3) of Section 357 of the Code is concerned, it empowers the Court to award compensation to victims while passing the judgment of conviction and for awarding such compensation there are no restrictions on the quantum thereof as we find on fine, provided for in the first proviso to Section 143 of the Act. In addition to conviction, the Court can order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. The Supreme Court in **Hari Singh case (supra)**, has observed that the power under sub-section (3) is not ancillary to other sentences but it is in addition thereto. This power was intended to do something so as to reassure the victim that he or she is not forgotten in the criminal justice system. The Supreme Court has observed that "it is measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way". A word of caution has

also been noted saying that the payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay." This will have to be borne in mind when Court pass order of payment as condition for suspending the sentence.

10. The provisions of sub-sections (1), (2) and (3) of Section 357 of the Code cannot be read as the learned counsel for the petitioner wanted me to read and they will have to be read in the manner aforestated. The object of providing power to award compensation under sub-section (1) of Section 357 is altogether different and,therefore, the payment of compensation, in whole or any part thereof, on appeal being presented does not automatically get stayed. The Court has power to give direction such as the one given in the instant petition to pay compensation as a condition precedent for suspending the sentence.

11. A reference can also be made to the judgment of Supreme Court in **Stanny Felix Pinto Vs. Jangid Builders Pvt Ltd and Anr (2001) 2 Supreme Court Cases 416** wherein while dealing with almost similar question

the following observations are made:

> "2. When a person was convicted under section 138 of the Negotiable Instruments Act and sentenced to imprisonment and fine he moved the superior court for suspension of the sentence. The High Court while entertaining his revision granted suspension of the sentence by imposing a condition that part of the fine shall be remitted in court within a specified time. It is against the said direction that this petition has been filed. In our view the High Court has done it correctly and in the interest of justice. We feel that while suspending the sentence for the offence under section 138 of the Negotiable Instruments Act it is advisable that the court imposes a condition that the fine part is remitted within a certain period. If the fine amount is heavy, the court can direct atleast a portion thereof to be remitted as the convicted person wants the sentence to be suspended **during the pendency of the appeal**. In this case the grievance of the appellant is that he is required by the High Court to remit a huge amount of rupees four lakhs as a condition to suspend the sentence. When considering the total amount of fine imposed by the trial Court (twenty lakhs of rupees) there is nothing unjust or unconscionable in imposing such a condition. As such no notice need be issued to the respondent. Appeal is accordingly dismissed."
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> (emphasis supplied)

The learned counsel for the petitioners endeavoured to distinguish this judgment contending that this would not apply to the facts of the present case since the instant proceedings are arising out of statutory appeal and not revision. The Supreme Court was considering the order passed by the High Court in the revision. In my opinion, this distinction will not

help the petitioner since the object of directing to pay the amount as a condition for suspending the sentence is not different. The Supreme Court has clearly observed that while suspending the sentence it is advisable that the Court imposes a condition that the fine part is remitted within a certain period. It has further observed that if the fine amount is heavy, the Court can direct atleast a portion thereof to be remitted as the convicted person wants the sentence to be suspended during pendency of the **"appeal"**. The Supreme Court has clearly laid down the principle/guideline as to the approach of the Court while dealing with the appeal or revision challenging the order of conviction under section 138 of the Negotiable Instruments Act. Therefore, in my opinion, the Sessions court, while dealing with the appeal against the conviction has sufficient power to direct the accused to pay the entire compensation or a portion thereof where the compensation amount is heavy, for suspending the sentence at the request of convict. In my opinion, on presenting the appeal against the order of conviction under section 138 of the Negotiable Instruments Act it is advisable that the court should impose a condition of payment for suspending the sentence of imprisonment and the compensation within a certain period. In the present case, out of the total compensation awarded by the

learned Magistrate of rupees fifteen lacs the Court has directed hardly five lacs to be paid within the time stipulated. In the circumstances, I find absolutely no reason to interfere with the impugned orders. The Appeal Court was right and justified in directing the accused to pay the amount, indicated in the order, as a condition for suspending the sentence/compensation and it is necessary in the interest of justice. In the result, the writ petitions and the criminal revision application fail and are accordingly dismissed. Rule discharged.

12. At this stage, Mr Jha, learned counsel for the petitioner, prays for six weeks time to pay the amount as per the impugned orders. Time to make payment as per the impugned orders in all the three petitions stands extended for a period of six weeks from today. At this stage, Mr Padam, learned counsel for the petitioner in the third petition, states that the petitioners may be given liberty to approach the Sessions Court for reduction of the amount of three lakhs, directed to be paid as per the impugned order. I am not in favour of granting such liberty.

(D.B.BHOSALE,J.)

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